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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1972

No.

STANLEY PAUL SCHU
Petitioner,

v.

COMMONWEALTH OF VIRGINIA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF VIRGINIA

Petitioner, Stanley Paul Schu, prays that a writ of certiorari issue to review the judgment of the Virginia Supreme Court rendered in these proceedings on April 15, 1973.

OPINIONS BELOW

The decision of the Virginia Supreme Court rejecting petitioner's appeal and refusing the Petition for Writ of Error and Supersedeas is included in the Appendix, infra.

JURISDICTION

The decision of the Virginia Supreme Court was entered on April 15, 1973. The jurisdiction of this Court is invoked under Title 28, U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether Section 54-524.101(a) Code of Virginia 1950 (1967 Repl. Vol., 1971 Cum. Supl.) permitting intent to distribute marijuana to be established merely by evidence of quantity is unconstitutional on its face and as applied to this case.

2. Whether the Virginia Drug Control Law classifying marijuana as a controlled drug, possession of which is a crime as is possession of narcotic drugs is unconstitutional.

3. Whether the arrest of the defendant herein was illegal, thereby voiding the subsequent search and seizure.

4. Whether the search incident to the arrest, assuming argundo that the arrest itself was legal, exceeded the constitutionally permissible scope and area, thereby rendering the search illegal.

5. Whether there was sufficient evidence to support a conviction of possession of marijuana with intent to distribute.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall

issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Constitution of the United States, Amendment V:

"No person shall...be deprived of life, liberty or property, without due process of law..."

Constitution of the United States, Amendment VIII:

"Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted."

Constitution of the United States, Amendment IX:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Constitution of the United States, Amendment XIV:

"...No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES INVOLVED

Section 54-524.101 (a) of the Code of Virginia 1950 (1967 Repl. Vol.) (1971 Cum. Supl.)

Unlawful acts; penalties - (a) Except as authorized by this chapter, it shall be unlawful for any person knowingly or intentionally:

(1) To distribute, or to possess with intent to distribute, a controlled drug;

(2) To manufacture a controlled drug.

A conviction for a violation of this §54-524.101 (a) may be based solely upon evidence as to the quantity of any controlled drug or drugs unlawfully possessed.

Section 54-524.80 of the Code of Virginia 1950 (1967 Repl. Vol.) (1971 Cum. Supl.) is reproduced in its entirety in the Appendix.

STATEMENT OF FACTS

On September 2, 1971, one Donald N. Clements, Special Agent for the U. S. Treasury Department assigned to the U. S. Customs Agency Service at Tuscon, Arizona, received certain information from an informer. The informer, whose identity was not revealed (tr.25) telephoned Clements sometime shortly after midnight and told him that "there was a suitcase aboard American Airlines Flight 246 which departed Tuscon 12:01 a.m."; and that the bag, which was number "419849" had "a very strong odor of marijuana about it". Informer further told Clements that "it was his belief" (tr.14) that an individual traveling under the name of Paul Mitchell had checked the bag; and that the bag would transfer from American Airlines Flight 246 to United Airlines Flight 706 which was scheduled to arrive in Norfolk, Virginia 10:55 a.m. on that same date.

The informer had no description of the subject individual except that he appeared to be approximately 22 years of age (tr.15). Even his race was not specified.

The informer did not relate how or when he came upon the information except that his belief was based on what he "thought he smelled" (tr.33). He did not state that he had seen any marijuana (tr.33).

Clements, who had no other knowledge concerning the alleged event except what was told by his unidentified informer, immediately telephoned Special Agent,

John Martsh, a Bureau of Narcotics and Dangerous Drugs Agent, and liason agent between the Nogalas district (Arizona) of the Customs Agency and the corresponding District of the Bureau of Narcotics and Dangerous Drugs (tr.16). Clements related the "exact" information to Mr. Martsh.

Clements then made another telephone call to Baltimore, Maryland and advised the Assistant Special Agent in Charge for Enforcement, one Edward H. Lisle "the exact information" that he had received (tr.17).

Lisle, thus received the same information as to the bag, the flight and the fact that an individual traveling under the name of Paul Mitchell was involved. Lisle was also told that one of the pieces of luggage, "covered by claim check number 419849, contained a quantity of marijuana". (tr.64). The only description that Lisle had from Clement as to the individual was that the name was "Mitchell" (tr. 64).

At approximately 8:30 a.m. on that morning Lisle telephoned one Mark Woods at Norfolk, Virginia, with the Customs Agency Service and advised him of the same information. Lisle also placed a telephone call to the local office of the Bureau of Narcotics and Dangerous Drugs to one Steven Sabel, in Baltimore (tr.64).

Upon receipt of the same information (tr.78) Mark Woods, at Norfolk, called Agent George Notel of the Norfolk Bureau of Narcotics and Dangerous Drugs and Sargeant Porter L. Richardson of the

Norfolk Police Department. These men, together with one John Farley of the Bureau of Narcotics, met at the Norfolk Airport in anticipation of the arrival of the plane from Chicago (tr.78).

One of these agents dressed as an employee of United Airlines and thereby was able to go out to the plane when it first arrived and to locate the bag with the number in question. Thereafter the agents were able to follow the bag until a man, identified later as defendant, appeared at the baggage claim area with some 30 or 35 other people at the baggage claim area and picked up the bag and other luggage and "summoned a Red Cap to assist him" (tr. 81).

John J. Farley, Jr., one of the Bureau of Narcotics and Dangerous Drugs agents who had had special training in narcotics (tr. 155) and with marijuana as "part of my training in handling narcotics and identification of drugs" was the man who dressed in the United Airlines uniform in order to go out to the plane and identify the bag before the luggage was presented to the passengers and public for claiming (tr. 155). Although he picked the bag up, he "noticed nothing unusual about it" and did not notice any smell of marijuana emanating therefrom (tr. 156). In fact, Farley testified at page 157 of the transcript that the way he saw the bag on that day, it "would not have been suspicious to him for any reason whatever."

The Red Cap placed the bag and other

luggage on his car and "carried them outside" (tr.81). As defendant went up to a taxi cab and "was giving the driver instructions as to where he wanted to go" with the Red Cap standing nearby with the luggage on his cart, Sargeant Richardson of the Norfolk Police Department, in company with the three other agents, quickly surrounded defendant, identified themselves and arrested him, taking him into physical custody (tr.81). At no time did defendant have the bag in question in his custody or, possession or control, but on the contrary, it remained on the cart of the Red Cap, in the Red Cap's possession some distance away from defendant until the officers themselves seized the bag physically at the time defendant was himself taken into custody.

At the time defendant walked outside of the Airport Agent Woods was approximately 8 feet from him, following him (tr.96); Sargeant Richardson was to defendant's immediate left, Agent Notel was standing behind defendant and Agent Farley was to Agent Notel's right (tr.96). In fact, Sargeant Richardson was within two or three feet of the defendant at that time (tr.96).

Immediately at the time of arrest, defendant was taken into the police office at the Airport (tr.98). At the time defendant was arrested the four agents were "right there" at the bag in question and it "stayed right within" them the whole time thereafter (tr.100) including the time that they took it with them into the police office where they found the bag was locked and directed defendant to give them the key to the

bag. Upon opening the bad under those circumstances, police found what appeared to be a large quantity of marijuana. Once the officers had witnesses the bag being claimed by defendant, they followed him under circumstances that he could not have gotten to the bag before they could have prevented it (tr.107). In fact, the witness, Agent Mark Woods, testified on page 107 of the transcript:

> Q Isn't it a fact that --look back now, Officer Woods, in your mind's eye, the four of you-- that young man under arrest there, isn't any way in the world he could have gotten that bag and gotten in that bag with you four men, under those circumstances, once you arrested him, is there?
>
> A No, I don't think he could have.

Agent George Notel had received his call in Norfolk at approximately 4:00 a.m. nevertheless no attempts were made to obtain either an arrest or search warrant, during the approximately 6 1/2 to 7 hours that followed before the plane actually arrived (tr.116).

Woods, the Norfolk Agent, had first received his call from Lisle in Baltimore about 8:45 a.m. In spite of the various telephone calls and alerting of the other agents and the meeting of the four at the Norfolk Airport at approximately 10:00 a.m. (tr.91), no attempts whatever were made to obtain a search warrant for the bag or an arrest warrant for the individual, although these officers thereafter made a physical

warrantless arrest on the exact same information that they had at the time they first left for the Airport and while they were awaiting arrival of the plane. Agent Woods estimated that they were at the Airport waiting for some 45 to 50 minutes before the plane landed (tr.91) during which time no mentioned was made of either obtaining an arrest warrant or a search warrant (tr.93).

Richardson, the Norfolk City Police Officer who actually made the physical arrest, received his information some three hours before the plane landed (tr.187). He was in the First Precinct, Police Headquarters, Public Safety Building in the City of Norfolk (tr.188) with a Justice of the Peace probably on duty as is customary, just one flight of steps down from Richardson (tr.188). He was not alone in the Police Department and there were others who could have helped him get a warrant for either an arrest or the search, but he did not do so.

Richardson's testimony was that he did not obtain an arrest warrant because he did not have sufficient information to make the arrest until he himself saw that the information was borne out. At pages 188 and 189 of the transcript he testified:

> Q For the man--did you have information, in your judgment, to make an arrest?
>
> A Yes sir.
>
> Q All right, sir, based on what Mr. Notel had told you?

A If it--if the information did bear out, then I did.

Q But you didn't have sufficient information then, unless you went and looked for yourself, isn't that what you're saying?

A Yes sir.

The agents were not able to overhear any conversation between defendant and the Red Cap, nor in fact did they hear defendant make any statement or any conversation at all except that Woods testified that he heard defendant tell the cab driver that "he had several stops, two or three stops to make before he would reach his ultimate destination".

While it was perfectly possible that the bag, even when seized, could have been taken to the Norfolk Police Department and a search warrant obtained, this was not done but, on the contrary, the bag was opened at the Airport without first obtaining a search warrant (tr.112). In fact, immediately after opening the bag at the Airport, it was taken down to the Norfolk Police Department (tr.113).

REASONS FOR GRANTING THE WRIT

For purposes of discussion, Questions Number 1 and 2 involving the constitutionality of the Virginia Drug Control Law will be deferred. A portion of the argument concerning the unconstitu-

tionality of a presumption based on mere quantity as sufficient basis for a conviction of intent to distribute a narcotic is somewhat akin to the argument on Question Number 5, i.e., insufficiency of the evidence, and is more appropriate to be discussed therewith.

I. The decision of the Virginia Supreme Court conflicts with prior decisions of this Court establishing requirements for probable cause to support a warrantless arrest.

Assuming, for the sake of argument that the offense suspected by the officers was in fact a felony in degree, there was insufficient and inadequate probable cause, as a matter of law, to support an arrest for any suspected criminal offense.

In the instant case, the arresting officer did not avail themselves of the procedure easily available to them; namely, procuring an arrest warrant. Having elected to ignore the proper course open to them, the Commonwealth must establish that probable cause existed to believe that either a felony had been committed or that a misdemeanor was being committed (in the presence of the officer) to the estent that he could see, observe and witness its commission with his own senses in order to justify a warrantless arrest.

While there is no easy answer to the question of what constitutes probable cause, only if the facts and circumstances before the arresting officer are such as to warrant a man of prudence and caution

to believe the offense has been committed, is it sufficient. Carroll v. United States, 267 U.S. 132 (1925). And, in Wong Sun v. United States, 371 U.S. 471 (1963), the Supreme Court of the United States said:

> "It is basic that an arrest with or without a warrant must stand upon firmer ground than mere suspicion, see Henry v. United States, 361 U.S. 98, 101, 4 L.Ed. 2d 144, 137, 80 S.Ct. 1968; though the arresting officer need not have in hand the evidence which would suffice to convict. The quantum of information which constitutes probable cause -- evidence which would 'warrant or demand a reasonable caution in the belief' that a felony has been committed, Carroll v. United States, 267 U.S. 132, 162, 69 L.Ed. 543, 55, 45 S.Ct. 280, 39 ALR 790 -- must be measured by the facts of the particular case."

And obviously, the result of the search can never be considered in determining probable cause. Henry v. United States, 361 U.S. 98 (1959).

At bar, there was a succession of police officers who testified, but obviously the factual basis for existence or non-existence of requisite 'probable cause' for belief of the commissioner of any grade of offense in this case is necessarily grounded upon the knowledge, or lack of knowledge of the chief prosecution witness, Don

Clements, of the Bureau of Customs at Tuscon, Arizona, who started the factual chain of events.

In Whiteley v. Warden, 401 U.S. 560, 39 L.W. 43,39 (March 29, 1971) a somewhat similar situation prevailed in the respect that the probable cause was attempted to be supplied by knowledge of one law enforcement officer, who caused a radio bulletin to be issued, and the arrest was made by another law enforcement officer, who had no other personal knowledge as to the probable commission of an offense.

The Supreme Court said:

> "In sum, the complaint on which the warrant issued here clearly could not support the finding of probable cause by the issuing magistrate. The arresting officer was not himself possessed of any factual data intending to corroborate the informer's tip that Daley and Whiteley committed the crime. Therefore, petitioners arrest violated his constitutional rights under the Fourth and Fourteenth Amendments; the evidence secured as an incident thereto should have been excluded from this trial. Mapp v. Ohio, 367 U.S. 643 (1961)."

The Supreme Court said that previously they had held that where the initial emphasis for an arrest was an informer's tip, information that was gathered by arresting officers could be

used to sustain a finding of probable cause for an arrest that could not adequately be supported by the tip alone and cited Draper v. United States, 3858 U.S. 307 (1959).

However, the Court continued:

> "But the additional information acquired by the arresting officer must in some sense be corroborative of the informer's tip that the arrestees committed the felony or, as in Draper were in the process of committing the felony."

Applying that mandate with the facts of Whiteley before them, they said:

> "In the present the very most the additional information tended to establish is that either Sheriff Ogburn, or his informant, or both of them knew Daley and Whiteley and the kind of car they drove; the record is devoid of any information at any stage of the proceeding from the time of the robbery to the event of the arrest and search that would support either the reliability of the informant or the informant's conclusion that these men were connected with a crime."

Thus the Commonwealth, at bar, rises or falls on the sufficiency of the information possessed by the witness, Clements. It remains only to apply to that information gathered by him, the required standards as established by the Supreme Court.

Clements came to his information by telephone (and we cannot challenge the sufficiency of the evidence, the credibility of which we are powerless to question, as to the reliability of the informer; the additional essentially required element of how the informer came in possession of his information and the reliability of his information we do vigorously challenge).

Clements had only the following information:

> That a suitcase (with no other description at all) bearing American Airlines baggage check number 419849, had been checked aboard American Airlines flight 246 which left Tuscon at 12:01 a.m.; that the informer "believed" that a man, with no description at all in any respect, and not even known if black or white, but approximately 22 years old had checked the bag and that it "was his belief that it was one Paul Mitchell"; that the bag was to be transferred to United Airlines flight number 706 at Chicago from Norfolk, Virginia, which was to arrive in Norfolk that morning; that the suitcase had a "strong odor of marijuana".

There was no additional information. There was no information as to the suspected intention as to the disposition of any contents within the suitcase; and there was no information as to the quantity of suspected marijuana that might have been in the suitcase; or in fact, if the suitcase then presently

contained any marijuana, or only formerly had.

There was no information that would have raised any suspicion, other than the sheerest speculation, that at most there was a possible mere possession of marijuana by someone. Possession of marijuana, by Virginia Statute is a misdemeanor. Virginia Code Section 54-524.101(c).

Moreover, throughout the case the informer's "tip" and any information Clements and his subsequent law enforcement associates had were silent and devoid of any information, evidence or indication as to how the unidentified informer obtained his information and whether or not he himself had observed it or was merely repeating a "rumor" or something that had been told him by some other undisclosed and perhaps unreliable person.

The strong inference was that he had not seen or observed any of the events himself since he qualified his knowledge with the expression that it was "his belief" that it has been checked by "Paul Mitchell"; further, his absolute silence as to a description at all in the kind of suitcase, color, etc., is strongly suggestive that he had not seen or observed it himself. (Commonwealth testimony by officers at trial was to the effect that it was an "unusual suitcase" and "the only one I had ever seen like that" as being an unusually colored suitcase, with an unusual lock.) Yet, the tip was silent in that regard.

In Spinelli v. United States, 393 U.S. 410 (1969) an informer's tip, the reliability thereof, and how he came

to gain this information was directly before the Supreme Court of the United States.

The Court there applied the "two prong test" of Aquilar v. Texas, 378 U. S. 108 (1964), in which it was held that an affidavit based solely on the hearsay report of an unidentified informant must set forth "some of the underlying circumstances from which the officer concluded that the informant . . . was credible or his information proved reliable".

It was concluded in Aquilar, supra, that the affidavit was insufficient because no information was presented to enable the magistrate to evaluate the informant's reliability or trustworthiness.

The Spinelli case has come to be known as the "neighborhood bar room" case as having outlawed, as being unreliable, any so-called "tip" or "rumor" that might not have been gained by personal and reliable observation but by unreliable rumor only.

Thus, in Spinelli, the Court said:

> "In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld on an accusation based merely on the individual's general reputation." (Italics ours)

In United States v. Harris, 403 U.S. 573, 39 L.W. 4835 (June 28, 1971), the Supreme Court of the United States construed Spinelli, supra, and pronounced the principles now applicable to the required test for sufficiency of "probable cause".

While it is true that Harris repudiated Spinelli in some respect, it did not overrule Spinelli.

In Spinelli, the Court had given no weight to the general reputation known to the officer of the defendant as a "trafficker in illegal whiskey."

To that extent, and only that extent, Harris did not follow Spinelli. In 39 L.W. 1199, the comment is made as to Harris and Spinelli:

> ". . .The U. S. Supreme Court difficulties to try to establish consistent Fourth Amendment guidelines for law officers . . are revealed once more (in Harris) as a 5-justice majority votes to ease the probable cause requirements that were set forth in Spinelli v. United States, supra. The majority specifically repudiates Spinelli's language forbidding use of the suspects reputation to help establish probable cause, and indicates that it isn't as hard to establish an informants reliability as Spinelli made it seem . . . .
>
> The Chief Justice, writing for the majority, holds the probable cause to search a suspected

moonshiner's premises was established by an affidavit based largely on hearsay obtained by an affiant from a 'prudent person' who had recent 'personal knowledge' of the suspects illegal whiskey sales and admitted having made several moonshine purchases from the suspect. In Spinelli, an FBI agent's mere allegation that the information was 'reliable' was held insufficient to establish the first 'prong' of the test to determine whether an informer's tip establishes probable cause.

In now holding that the magistrate who issued the warrant was entitled to consider, in determining whether probable cause existed, the affiant's knowledge of the suspect's reputation as a moonshiner, the majority decides 'to the extent that Spinelli prohibits the use of such probative information, it has no support in our prior cases, logic, or experience and we decline to apply it to preclude a magistrate from relying on a law enforcement officer's knowledge of the suspect's reputation.'

The majority is particularly impressed by the informer's declaration against penal interest -- his admission that he himself had made recent illegal purchases from the defendant. The Court also notes that, unlike the affidavit

specifically alleged that the informer had personal knowledge of the illegal activity . . . ." (Italics ours)

Obviously, Spinelli and Harris both are still very much in effect and govern this case dictating a finding that insufficient probable cause existed because of the absence of underlying circumstances as to how the undisclosed informer came in possession of his information.

In Harris, supra, the Court relied on "recent" and "personal" knowledge; at bar, there is no information in the informer's tip that demonstrates personal knowledge at all; in Harris the Court was "particularly impressed". The informer's tip at bar in no way makes any declaration against his own interest.

In Manley v. Commonwealth, 211 Va. 146, 176 S.E.2d 309 (1970), the Virginia Supreme Court of Appeals grounded a finding of probable cause on a similar presence of declaration against interest by an unknown informer.

The Court stated:

"Here the affidavit established that the informant was stating facts based on his own personal knowledge and was relating his participation in defendant's illegal activity. His statements were admissions against interest. These facts certainly show a substantial basis for the officer-affiant to state that the informant was reliable and for a neutral and detached magistrate

to conclude that the informant's information was reliable and that probable cause existed for the issuance of the warrant." (Italics ours).

Obviously, a comparison of the meager information supplied at bar by the informer did not supply those requirements that had been enunciated in Spinelli, Harris and Manley, supra.

More to the point is the precise language of Harris, supra, by the Supreme Court of the United States:

> "The substance of the tip, held sufficient in Jones, closely parallels that held insufficient by the Court of Appeals. Both recount personal and recent observation by an unidentified informant of criminal activity, factors showing that the information had been gained in a reliable manner, and serving to distinguish both tips from that held insufficient in Spinelli, supra, in which the affidavit failed to explain how the informant came by his information." (Italics ours)

It is respectfully submitted that for the foregoing reasons, there was inadequate and insufficient basis for determining that the information that the informer himself had received was reliable, even though the informer himself may have believed it and that he himself may have been reliable in his previous dealings. See People v. Ackerman, 274

N.E.2d 125 (Ill.). Thus, there was insufficient probable cause to believe that a felony either had been committed or was about to be committed thereby rendering the warrantless arrest illegal.

In addition, there was insufficient probable cause to believe that a misdemeanor was being committed in the presence of the arresting officer to render the warrantless arrest valid.

While it has long been the law in Virginia that "probable cause" is sufficient to justify an arrest for a felony, Michie's Juris., Arrest Section 8, page 123, with respect to misdemeanors, however, it has been held in Muscoe v. Commonwealth, 86 Va. 443 (1890), that an arrest must be made either with a warrant or when the offense was committed in the presence of the arresting officer. The Court in Muscoe v. Commonwealth said:

> "By the general laws of the State, upon which this subject, are, for the most part, the common law, a constable may, virtute officii, without warrant, arrest for felony, and for misdemeanors committed in his presence, and take the offender before a magistrate to be dealt with according to law. Peace officers may also without warrant, enforce the ordinary laws of police by the arrest of vagrance, and drunken and disorderly persons, and detain them for the action of the proper police magistrates. But, in general, in cases of a misdemeanor, a constable or other peace officer cannot, any more than a private person, justify the arrest

of the offender without a warrant when the offense was not committed in his presence."

Section 19.1-100.2 of the Code of Virginia provides authority for police officers to stop, question and search suspicious persons. This authority extends to officers to "detain a person in a public place whom he reasonably suspects is committing, has committed, or is about to commit a felony or possesses a concealed weapon in violation of Section 18.1-269, and may require of such person his name and address." This section specifically applied to felonies and does not include misdemeanors with the exception of possession of a concealed weapon.

Moreover, the general law throughout the United States requires that in order to arrest for a misdemeanor, the offense must occur in the presence of the arresting officer. It has been said that "if an officer does not know of the acts constituting an offense, that offense is not being committed in his presence in respect of the justification of an arrest without a warrant." 5 Am. Jur. 2d, Arrest, §31, p. 721. Under Arrest section in Am. Jur. 2d, the following appears:

"The acts must become known to the officer at the time of their commission, through his sensory perception, and he must infer that they constitute an offense. Even if the person arrested is in fact violating the law, the offense is not in legal contemplation committed in the officer's presence so as to authorize an arrest without a

> warrant, when the facts constituting it are incapable of being observed; or are not observed, until after the arrest and a search of the offender's person. But an arrest is not justified by the fact that the officer has information from persons which leads him to believe an offense is being committed in his presence; the facts constituted in the events must have been within his own knowledge."

It appears clear and settled law then, that in order to arrest a defendant in Virginia for possession of marijuana it is necessary that the officer either have probable cause that the suspect has a sufficient quantity to come within the felony provisions or that he intends to sell the drug. In order to arrest for a misdemeanor, knowledge of the possession must come from the officer's own sensory perception. He must either see it or smell it himself in order to make an arrest without a warrant for a misdemeanor. Recent decisions in other states support this position. Byrum v. State, 490 P.2d 531, 534 (Okla. 1971).

In a virtually identical case to the present one, the Minnesota Supreme Court ruled that an arrest for possession of LSD could not be made without a warrant. State v. Miller, 185 N.W.2d 872 (Minn. Mar. 26, 1971). In that case, the defendant was arrested and charged with possession of LSD, which is a gross misdemeanor under Minnesota law, without a warrant. The arresting police officer in Mankato, Minnesota, received a telephone call from the Chief of Police in

a neighboring town, that a reliable informant had advised him that the defendant and two other individuals were traveling in a dark blue Corvair and departed Northfield in the direction of Mankato. In addition, he told the Mankato officer that the defendant had in his possession a large quantity of LSD and that the three were traveling to the apartment of a named individual in a certain apartment complex in Mankato, Minnesota. The Mandato officers spotted the car and made the arrest based on this information without a warrant. The question squarely presented before the Minnesota Supreme Court was whether an arrest may be made for a misdemeanor when probable cause is based on information supplied by a reliable informer. Under Minnesota law, as under Virginia law, an arrest for a misdemeanor may not be made without a warrant unless the offense occurs in the presence of the arresting officer. The Court said:

> "'It cannot be said that a criminal offense is committed in the presence of an officer, unless the acts constituting the offense become known to him at the time they are committed through his sense of sight, or through other senses Although a person may actually be committing a criminal offense, it is not committed in the presence of an officer within the meaning of the statute, if the officer does not know it. And, where the officer could not observe nor become cognizant of the act constituting the offense by the use of his senses, it could not be committed in his presence so as to authorize an

arrest without a warrant.'"

The Court further said, citing an earlier Minnesota case:

> "Clearly two elements must appear before an offense is committed in the presence of an officer: (1) He must become aware of the acts as a result of his sensory perception and (2) he must infer that the facts constitute an offense."

The Court ruled that the arrest was invalid. One of the justices in a concurring opinion stated:

> "Had the possession of LSD been a felony, the requirement of our statute would have been met."

Other states have reached a similar result, requiring more than information from an informer in order to make an arrest on a misdemeanor. In the recent case of Pate v. Municipal Court for Modesto Judicial District, 11 Cal. App. 3d 721, 89 Cal. Reptr. 893, the Court said that "presence" within their statute permitting police officers to make misdemeanor arrest whenever he has reasonable cause to believe that the arrested person has committed a public offense in his presence, is not merely physical proximity, but occurs when the crime is apparent to the officer's senses. In that case, a reliable informer gave the police a tip that lewd films were going to be shown that evening in a motel room. The officers went to the motel and observed flickering lights emanating from behind draperies of the motel room window. An officer climbed up and peered into the window

through a slit in the drapes and saw the obscene films. The Court said:

> "But, it stretches the imagination to believe that the public offense which was being committed in the privacy of the motel room was also committed in the presence of (the officers) who were standing in the patio on the floor below merely because they could see flickering lights emanating from behind drawn curtains. Although the officers could see the flickering lights, they could not tell, from the use of their own senses, whether they were coming from a motion picture projecture, a television screen, or some other source. Furthermore . . . they had no way of knowing that lewd films were being displayed at that particular time."

The Court reversed the conviction. The same principles apply to arrests where the possession of a substance such as marijuana may be a misdemeanor or evidence of a felony depending on the quantity and the intentions of the person in possession of the substance. There must be probable cause to believe that a felony has been or is about to be committed. This means that there must be more information than merely a simple suggestion or belief that some marijuana is present with nothing more. For example, in State v. Larsen, 4 Wash. App. 356, 484 P.2d 464 (1971) this same issue was considered. Here, a reliable informant gave information that he saw and observed a suitcase which contained white plastic bags believed to be marijuana in the rear of a Chevrolet van having a specific license number. The informant also told the

police that the van was occupied by two white males from California, that they planned to sell the marijuana in Washington and then return to the south. The Court found that a reasonable and prudent person would be convinced that the marijuana in the white plastic bags carried in a suitcase by persons entering the State for the primary purpose of selling it would weigh more than the 40 grams necessary by statute to presume an intent to sell, which was a felony under the law of Washington. In that case, the information from an informant provided a basis that the suspects had a sufficient quantity to come within the felony law and specifically stated they intended to sell it. None of these factors are present in the instant case. Not even a visual observation of the alleged contraband.

Mere smell cannot operate without more to constitute probable cause that a marijuana felony has been or is about to be committed. The most that it could conceivably indicate is that there is some basis for suspecting that a misdemeanor has been or is about to be committed. An arrest for a misdemeanor cannot be made on this information.

The case of Johnson v. United States, 333 U.S. 10 (1947) is particularly instructive on this point. In that case, officers received information from a confidential informer who was also a narcotic user, that unknown persons were smoking opium in the Europe Hotel. The informer was taken back to the hotel to interview the manager, but he returned at once saying he could smell burning opium in the hallway. The officer communicated with Federal narcotics

agents and then went back to the hotel with four agents. All were experienced in narcotics work and recognized at once the strong odor of burning opium which to them was distinctive and unmistakable. The odor led to a specific room. The officers did not know who was occupying that room. The officers then knocked and entered the room. They told the occupant that they wanted to talk with herabout the opium smell in the room. She denied that there was such a smell. They then placed her under arrest and began to search the room. The search turned up incriminating opium and smoking apparatus, the latter being warm, apparently from recent use. On the question of the odors, the Court said:

> "At the time entry was demanded, the officers were possessed of evidence which a magistrate might have found to be probable cause for issuing a search warrant . . .If the presence of odors is testified to before a magistrate and he finds the affiant qualified to know the odor, and it is one sufficiently distinctive to identify a forbidden substance, this Court has never held such a basis insufficient to justify the issuance of a search warrant. Indeed, it might very well be found to be evidence of most persuasive character.
>
> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring

> that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the amendment to a nullity and leave the people's homes secure only in the discretion of police officers."

The government contended that the search was valid because it was incident to an arrest. The Court said that "since it was without a warrant, it could be valid only for a crime committed in the presence of the arresting officer or for a felony of which he had reasonable cause to believe defendant guilty." The government conceded that the arresting officer did not have probable cause to arrest petitioner until he had entered the room and found her to be the sole occupant. The Court said:

> "Thus the government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do."

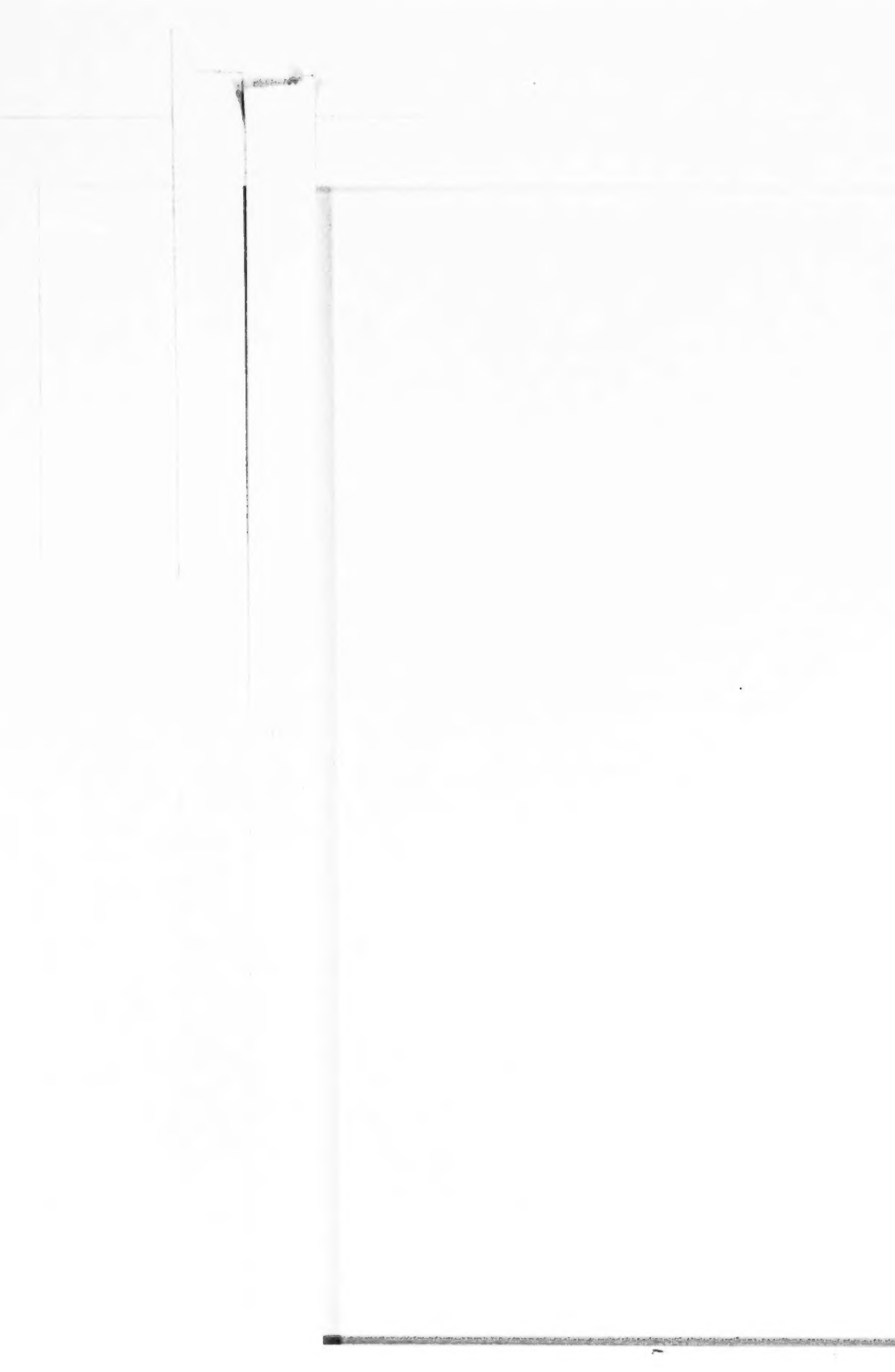
The Johnson case indicates that odors, provided they are detected by persons shown to be sufficiently familiar with the substance, might well be sufficient basis for issuing a search warrant. But because of the elusive quality of odors, and the inability of odors to necessarily reflect quantity, it cannot be said that odor alone without anything to suggest

quantity or intent constitutes probable cause for a warrantless arrest for a felony. The information from the informant in this case suggested nothing more than that the substance of marijuana might be present. The informer did not even see the substance. He merely stated that the subject suitcase had the odor of marijuana and that he believed it contained marijuana. This is not sufficient to justify an arrest of the defendant without a warrant. The fact that the subsequent warrantless search proved fruitful does not justify the arrest in the first instance.

II. The decision of the Virginia Supreme Court conflicts with prior decisions of this Court establishing requirements for conducting a warrantless search and establishing the permissible scope of search.

It is settled that evidence obtained contrary to the provisions of the Fourth Amendment to the Constitution of the United States and Article 1, Section 10 of the Constitution of Virginia, is inadmissible. Weeks v. United States, 232 U.S. 383 (1914); Wolf v. Colorado, 338 U.S. 25 (1949); Mapp v. Ohio, 367 U.S. 643 (1961).

"If the arrest is unlawful for any reason, the incidental search of the arrested person is also unlawful, and any fruits of such a search will be inadmissible in Court." Wong Sun v. United States, 371 U.S. 471 (1963). This is, of course, the recognized Doctrine known as the "Fruit of the Poisonous Tree".



Silverthorne v. United States, 251 U.S. 385 (1920); Nardone v. United States, 308 U.S. 338 (1939).

Under the facts at bar, it is respectfully submitted that the evidence seized by the officers should be excluded from the case because the arrest itself, which is advanced by the Commonwealth as justification for the search and seizure, was improper and illegal, thereby coming within the settled rule of Mapp v. Ohio, supra.

The Supreme Court of the United States has, on June 21, 1971, in the case of Coolidge v. New Hampshire, 403 U.S. 443, 49 L.W. 4795, in a detailed opinion, established the principles governing the illegality of warrantless searches and the few and only exceptions to that rule that will allow evidence seized thereby.

Remembering that both the arrest and the search were conducted without warrants and that such activity has been indicted by the Supreme Court of the United States as unreasonable per se, with the burden on the prosecution to demonstrate the exigencies and the necessity for same, we bring to the Courts attention the evidence that a search warrant could easily have been obtained had the officer chosen to do so.

Where once there was a question as to whether or not the failure to obtain a warrant when the opportunity was present was material, see United States v. Rabinowitz, 339 U.S. 36 (1950), "that element of Rabinowitz seems to be

overruled sub silentio in a series of recent cases culminating in Mancusi v. Deforte, 392 U.S. 364 (June 17, 1968) which appears to hold that 'it is settled for the purposes of the Fourth Amendment that except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant.'" Searches and Seizures Handbook, Practicing Law Institute, 1971, page 37.

Thus, the reasonableness of the instant warrantless search where there was no security problem; where defendant was in physical custody of four law officers; where the suitcase in question was in the officers' custody; and where the suitcase was inexplicably opened at the airport to see what was in it and then taken to the police station downtown without complication where a thorough search was made; and where a justice of the peace and search warrant were easily available is not only drawn into sharp question, but we submit is sufficient in and of itself, to demonstrate unreasonableness and illegal search. Certainly, failing any explanation at all and any evidence by the Commonwealth of the necessity or "exigency" as required by the Supreme Court in Coolidge, supra, we submit that on its face the search was unreasonable and illegal.

However, this Honorable Court is not required to attempt to apply a subjective measure of what is reasonable or unreasonable under the circumstances because the Supreme Court has defined in Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1965), what is permissible and what is impermissible

if it extends beyond the arrestee's person and the area from which he can obtain a weapon, or obtain and destroy something that can be used as evidence against him.

At Page 766 of the opinion in Chimel, the Supreme Court stated:

> "It would be possible, of course, to draw a line between Rabinowitz and Harris on the one hand and this case on the other. For Rabinowitz involved a single room, and Harris a four-room apartment, while in the case before us an entire house was searched, but such a distinction would be entirely artificial. The rationale that allowed the searches and seizures in Rabinowitz and Harris would allow the searches and seizures in this case. No consideration relevant to the Fourth Amendment suggests any point of rational limitation, once the search is allowed to go beyond the area from which the person arresting might obtain weapons or evidentuary items. The only reasoned distinction is one between the search of the person arrested in the area within his reach on the one hand, and more extensive search is on the other."

And again, at page 768, the Court said:

> "Rabinowitz and Harris had the subject of a critical commentare for many years, and have been relied upon less and less in our own decisions. It is time, for the reasons we have stated, to hold it on their own

> facts, and insofar as the principles they stand for are inconsistent with those that we have endorsed today, they are no longer to be followed.
>
> Application of sound Fourth Amendment principles to the facts of this case produces a clear result. The search here went far beyond the petitioners person and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him. There was no constitutional justification, in the absence of a search warrant, for extent in the search beyond that area. The scope of the search was, therefore, 'unreasonable' under the Fourth and Fourteenth Amendments, the petitioner's conviction cannot stand."

Obviously, the Supreme Court dispensed with any argument, as is being made at bar, that there is some distinction in the extent of the search in a house or whether it involves more than one room, etc. The Court clearly and expressly indicates that "the only rational distinction is one between the search of the person arrested and the area within his reach on the one hand, and more extensive search is on the other," legalizing those involving weapons and evidentuary items, and nullifying those that are more extensive, no matter how little or how great.

Virginia, in Kirkpatrick v. Commonwealth, 176 Va. 802, 176 S.E.2d 802 (1970) acknowledges and follows Chimel as overruling Rabinowitz and Harris (but applied it prospectively only). The search at bar took place on September 2, 1971. Kirkpatrick, supra, concludes that Chimel applies "to searches conducted after June 23, 1969 . . . ."

See Porter v. Ashmore, 421 F.2d 1186 (4th Cir. 1971).

Certainly typical of a proper construction of the express language of Chimel is the language in holding in Harris v. Commonwealth, 469 S.W.2d (68 K.Y.) in declaring the search of a suitcase, under similar circumstances, illegal as being beyond the scope of permissible search of the arrestees person. There the Court said:

> "However, we have an additional problem in that the suitcase was opened up and the Jury permitted to view its contents which were not visible to the officers at the time of the arrest. This we do not believe they could do . . . .
>
> From the foregoing it would appear that the officers could probably seize a suitcase and the suitcase as such was introduceable as evidence but only as a suitcase. What was placed in evidence what was of significance was the contents of the suitcase. These contents we consider to be illegally seized.

> Therefore, upon another trial the contents of the suitcase may not be introduced in the evidence. We reach this conclusion because the suitcase as a container, viz, its contents are not an integral part of the suitcase itself . . . ."

The Commonwealth at the time of the trial hereof cited as authority United States v. Mehcize, 437 F.2d 145 (9th Cir. 1971). Needless to say, the 9th Circuit Court of Appeals does not overrule the mandate of Chimel of the Supreme Court, nor does it overcome the express language of Kirkpatrick, Virginia's construction of Chimel, and effective in this Commonwealth, that a warrantless search is impermissible beyond the arrestees person or the area from which he can obtain a weapon or destroy evidence.

III. Section 54-524.101(a), Code of Virginia 1950 (1967 Repl. Vol., Cum. Supl.), permitting intent to distribute marijuana to be established merely by evidence of quantity is unconstitutional on its face and as applied to this case.

Subsequent to defendant's conviction and sentence, the Supreme Court of Virginia in Sharp v. Commonwealth, 192 S.E.2d 217, struck down the statutory provision of Section 54-524.101 (a) (which subsequently was repealed by

the 1972 General Assembly of Virginia, which enacted in lieu thereof Section 54-524.101;1, which now omits the offending subsidiary provision as to a conviction being based solely on evidence as to quantity).

Accordingly, the issue of unconstitutionality of that provision which was raised at the trial below, and the question raised in this Petition for Write of Certiorari has now been answered. Since the Petitioner was convicted under circumstances which demonstrated application by the trial-judge of the now -- declared unconstitutional statutory provision, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Petitioner submits that there was no other evidence introduced at trial other than possession of a quantity of marijuana, if such be admissible, which would support the Commonwealth's contention of possession with the intent to distribute.

The evidence, if its

admissibility survives the assault based on the illegal arrest, illegal search and illegal seizure, supra, demonstrates a mere possession of marijuana but nothing more. There is no evidence that defendant planned or intended to distribute the marijuana. Section 54-524.2(b) (11) defines "distribute" as meaning "to deliver a controlled drug." "Distributor" means a person who delivers a controlled drug.

Again, in §(8) of the same statutory section, "deliver" or "delivery" means "the actual, constructive, or attempted transfer of a controlled drug, whether or not there exists an agency relationship."

There was no evidence of any delivery of the controlled drug; there was no evidence of any transfer or attempted transfer of a controlled drug.

On the contrary, the only evidence was that there was a locked suitcase, claimed at an airlines public baggage claim area by the defendant, which suitcase when opened contained a large amount of marijuana.

The Trial Judge, at page 88 of the transcript, orally stated from the Bench the sole evidence upon which he based a finding of intent to distribute in addition to the outlawed statutory provision then in effect as to a conviction being based solely on the amount possessed.

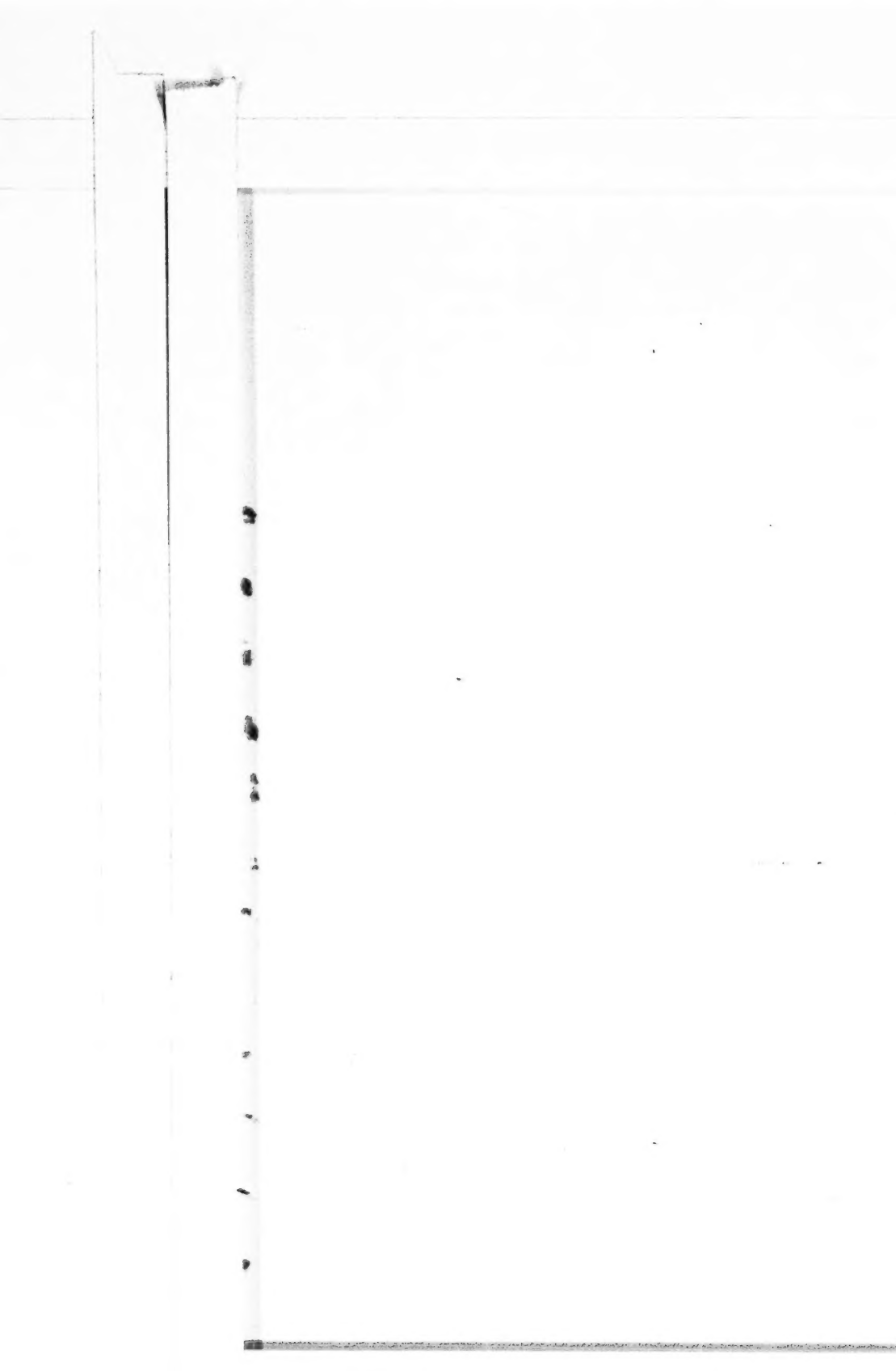
The Court detailed the "several other factors" upon which he relied as

(1) the defendant used an alias -- Paul Mitchell instead of his own name and (2) he had "come all the way from Tucson, Arizona to Norfolk, Virginia . . . with this quantity of marijuana"; of which there was no evidence as it was only inferentially included in the informer's tip, admissible only on the question of probable cause, and there being no other evidence whatever that defendant had traveled from where he had come or that he had done anything more than claim the bag at its ultimate destination (3) the defendant "admitted that it was his suitcase" and "produced the key to the suitcase from a chain in his pocket" and (4) he was overheard by Officer Richardson to state to the cab driver in front of the airport that he "had several places to go."

It is submitted that at most these factors amount to nothing more than suspicion.

It is too well settled to require citation of authorities that no amount of suspicion, however great, authorizes a criminal conviction and that every necessary element and ingredient of the offense must be established by the Commonwealth beyond a reasonable doubt. Certainly this cannot be said of the evidence in regard to any finding by the Court that defendant did possess narcotics with intention to distribute.

Finally, it is difficult to reconcile the Court's finding with the time honored principle that the presumption of innocence that a defendant enjoys not only attaches initially, but follows him



throughout the trial and applies at every state thereof. The separate factors selected by the Court from the evidence of use of an alias, admitted ownership of the suitcase and the fact that he told the cab driver "he had several places to go" are totally and entirely as consistent with reasonable hypotheses of defendant's innocence as well as with any imagined intention to distribute. Necessarily defendnat should enjoy the benefit of any such consistency with innocence.

The offense of which the defendant has been convicted is one of "intention"; it is submitted that it was incumbent upon the Commonwealth to establish, beyond a reasonable doubt, the specific intent of the defendant to distribute the marijuana, which they have failed to do.

In short, the evidence -- now that this Honorable Court has declared as impermissible any presumption of intent to distribute from quantity alone, falls far short of that which is required in order to convict.

IV. The Virginia Drug Control Law, Section 54-524.80, Code of Virginia, 1950 (1967 Repl. Vol. 1971 Cum. Supl.), classifying marijuana as a controlled drug, possession of which is a crime, is unconstitutional.

It is petitioner's contention that the classification of marijuana as a narcotic drug under the Virginia statutory scheme violates constitutional

standards in denying to Petitioner equal protection of the law; in being an unconstitutional infringement upon the right of the people to privacy and the pursuit of happiness, protected by the Ninth Amendment to the Constitution of the United States; and as being in violation of the Eighth Amendment in constituting cruel and unusual punishment.

Petitioner contends that there is no rational nor scientifically established basis for including marijuana within Schedule I of the Drug Control Law Section 54-524.80, Code of Virginia 1950, et seq. (appended hereto) as a harmful narcotic drug, or in fact, for making its possession and use criminal at all. The State's treatment of marijuana as a controlled drug is inconsistent with its permissive and licensed treatment of alcohol and tobacco, which the evidence established without contradiction are no less harmful (if not more so) than marijuana.

At trial, Petitioner introduced testimony in support of his position that marijuana was wrongfully classified as a harmful narcotic drug. The Commonwealth offered no evidence in this regard. Petitioner's evidence was in the form of testimony by Mr. Raymond A. Marino, State Toxicologist, Chief Medical Examiner's Office, Norfolk, Virginia, and Dr. Mallory Read, Jr.

Mr. Marino has been employed as a state toxicologist for some sixteen years. In his testimony, he detailed his academic experience and training, together with his twenty years experience in the field of toxicology. He holds a Bachelor of

Science Degree in Chemistry; a Master of Science Degree in Forensic Toxicology; he is a Senior Graduate Member of the American Chemical Society; a Fellow of the American Academy of Forensic Science; a member of the International Association of Forensic Toxicology; and a member of the American Association of Poison Controllers. For the past sixteen years, he has been the only toxicologist in the Norfolk office of the State Medical Examiner, which office has responsibility for handling the drug analysis and poison analysis for the Norfolk, Virginia area. He estimated that he had testified on behalf of the Commonwealth of Virginia "about 2,000, 2,500 times, something like that."

Dr. Mallory Read, Jr. is a medical doctor, licensed to practice in the Commonwealth of Virginia. He holds a Bachelor of Arts Degree from the University of Virginia, and a Doctor of Medicine Degree from the Medical College of Virginia. He served a rotating general internship at Norfolk General Hospital and has been active in the Norfolk area in drug abuse and addict rehabilitation. He also engages in private practice in the Emergency Room of Norfolk General Hospital, together with two other physicians, the three of whom supply all the medical service for the Emergency Room at that large hospital.

His experience in the drug abuse and rehabilitation field is as a member of the Board of Directors of the Norfolk Free Clinic, and as a Clinical Director of that establishment where some 200 adolescents and young adults had been treated for drug abuse; he is a member of

the Board of Directors of the Narcotics Addicts Rehabilitation Center in Portsmouth, where some 360 heroin addicts have been detoxified; he is on the Board of Directors of the Norfolk Drug Focus Committee, an organization out of the Commonwealth Attorney's Office of the City of Norfolk to organize the various drug abuse prevention committees and facilities in the City.

It was the considered judgment of both Mr. Morano (tr.24,28) and Dr. Read (tr.53,54) that alcohol was a far greater problem and menace to society than marijuana.

Mr. Morano explained what "opiates" are. The term, he testified, basically includes "the mother substance," morphine. Morphine is the natural ingredient in the opiate poppy:

> ". . . and Codeine in methylmorphine which is a derivative, also, of the opium poppy. Heroin is diacetylmorphine which is a semisynthetic; that is, morphine, which is a natural product, is treated chemically and diacetyl or diamorphine, which is heroin, which is produced."

Both morphine and heroin, he testified, are opiates. Marijuana is <u>not</u> an opiate (tr.13).

However, under the Virginia Drug Control Law, marijuana is classified as a Schedule I drug together with the opiates, the distribution of which subjects the distributor to precisely the

same punishment as for distribution of the opiates.

Mr. Morano further testified that marijuana is not addictive (tr.13) as are the opiates; that marijuana does not in any manner compare with the development of a tolerance, such as the opiates, in the user, requiring more and more use of the substance progressively (tr.15); and that there are withdrawal symptoms in humans involved in the use of morphine and heroin, whereas there are no withdrawal symptoms associated with the use of marijuana (tr.16). To the knowledge of this witness there were no recorded deaths from marijuana (tr.16) again vastly unlike the situation concerning the use of opiates.

Additionally, Mr. Morano testified that the use of marijuana does not lead to the use of the so-called "hard" drugs (tr.21) and he agreed with and read from a portion of the report of The President's Commission on Law Enforcement and Administration of Justice Task Force, Narcotics and Drug Abuse, 1972:

> "The charge that marijuana leads to the use of addicting drugs needs to be critically examined. There is evidence that a majority of the heroin users who come to the attention of public authorities have, in fact, had some prior experience with marijuana. But this does not mean that one leads to the other in the sense that marijuana has an intrinsic quality that

creates a heroin liability. There are too many marijuana users who do not graduate to heroin, and too many heroin addicts with no known prior marijuana use, to support such a theory. Moreover, there is no scientific basis for such a theory. The basic text on pharmacology, Goodman and Gilman, The Pharmacological Basis of Therapeutics in (MacMillan 1960) states quite explicitly that marijuana habituation does not lead to the use of heroin."

Finally, Mr. Morano, pointedly stated that, in his judgment, marijuana is not a narcotic (tr.19) and that its classification as a Schedule I drug is wrong and improper (tr.18). Said Mr. Morano:

"Well, I have contended this for a number of years. This is not anything new with my feeling or opinion on this. I think that marijuana certainly does not belong in Schedule I."

Dr. Read corroborated the opinions of Mr. Morano. He testified that marijuana was "definitely not a narcotic" (tr.56), and that it was "misplaced in the narcotic category"; that using the language of the Virginia Statute as to "high potential for abuse", marijuana had no such high potential (tr.57), but that on the other hand,

there was high potential for abuse and relative toxicity in abusing ethanol, ethyl alcohol, whiskey and tobacco cigarettes (tr.57).

Dr. Read testified that it had been established that:

> "Four cigarettes smoked simultaneously are fatal. Fortunately for cigarette smokers, nicotine is metabolized very rapidly and they usually only smoke one at a time and they survive. One nicotine cigarette kills a cat. It is very toxic.
>
> "In comparison with cannabis (marijuana), 296 centiliters of absolute alcohol or grain alcohol, ethanol, is fatal to the human, to a 150 pound man. (Two-thirds of a fifth of 86 proof whiskey rapidly drunk.)
>
> "The relative comparison here is 800 standard grade -- and, of course, this is hard to define because it is all criminal source -- marijuana; 800 marijuana cigarettes of the same weight as the tobacco cigarettes would have to be smoked, theoretically simultaneously, to produce death and the death in the victim would not be a result even then of the toxicity of the cannabis, but more they die from smoke inhalation and carbon monoxide poisoning."

The justifications for the State's prohibition of the use and sale of marijuana have been numerous. Basically the State's interest has been in preventing harm to its citizens and to other persons, preventing excessive or chronic use because such use destroys the user's social usefulness and is likely to render him dependent upon the State for subsistence, and that marijuana, if not addictive, causes a psychological dependence and leads to the use of other drugs. See Bonnie and Whitebread, 56 Va. L.Rev. 971 (October 1970) p. 1130-1131. These justifications are without merit and are unsubstantiated. They have been so recognized, even by courts upholding state legislation on other grounds. See People v. Aguiar, 257 Cal. App.2d 597, 602-603, 65 Cal. Reptr. 171, 174-175 (1968); People v. Stark, 157 Col. 59, 66, 400 P.2d 923, 927 (1965).

Petitioner contends that the uncontradicted evidence at bar established that current medical and scientific learning do not support the State's classification or any of the justifications for the criminal prohibition of marijuana. Therefore, its prohibition is arbitrary and discriminatory, violating both the Due Process Clause and the Equal Protection Clause of the United States Constitution.

In People v. McCabe, 49 Ill.2d 338 (May 9, 1971), the Illinois Supreme Court said:

> "Classifying of marijuana under the Narcotic Drug Act rather than classifying it

> under the Drug Abuse Control Act (Ill. Rev. Stat. 1969, Ch. 111 1/2 par. 801, et seq.) with the 'stimulant or depressant' drugs is constitutionally invalid as an improper classification, considering the present state of knowledge concerning the comparative natures and effects of the drugs named in the two statutes. * * *
>
> "We hold that the present classification of marijuana is arbitrary and deprives the defendant of equal protection of the law."

In reaching its holding the Illinois Supreme Court considered whether any rational basis existed to justify the substantially greater penalties imposed for a first conviction for a sale of marijuana (ten year minimum) than for a sale of a drug under the Drug Abuse Control Act.

Although the Virginia statutory scheme differs greatly from the Illinois legislation, the importance of People v. McCabe, supra, is that the court recognized the arbitrariness of the classification of marijuana with "hard drugs" and the unfairness of the more severe punishment when applied to a sale of marijuana. Under Virginia law mere possession of any quantity with intent to distribute it can result in up to forty years imprisonment. Clearly, the punishment has no relation to the offense and based upon contemporary knowledge, there is no reasonable basis

for treating the sale or distribution of marijuana differently than alcohol or tobacco. Certainly, at a minimum, the penalties imposed upon possession with intent to distribute are grossly disproportionate to the nature of the crime, even assuming arguendo that the State has a legitimate interest in prohibiting the use or sale of marijuana. See discussion of current scientific knowledge, Professors Bonnie and Whitebread, supra.

The prohibition of marijuana is an unconstitutional infringement upon the right of the people to privacy and the pursuit of happiness, protected particularly by the Ninth Amendment to the Constitution of the United States. Wherever such individual rights are involved there must be a substantial and compelling justification before the State can extend its police powers into these areas. Since it is apparent that individual liberties are involved, the Virginia Drug Control Act is not entitled to a presumption of rationality which would ordinarily adhere to legislative enactments. Rather, the Commonwealth must meet the burden of establishing the justification of the extension of its police powers into the right of citizens to privacy and the pursuit of happiness.

The scope of individual liberties had always been broad in this nation and especially in the Commonwealth of Virginia, but the scope of liberties has always been greatest in the case of private conduct, or what John Stewart Mill referred to as "self-regarding conduct" in his classic essay "On Liberty". This has been so, not only because these private, personal rights have historically

been precisely and jealously held by free men, but also because, as the conduct of the individual becomes more private, the interest of the state becomes less compelling and less direct. This doctrine has been more important lately than it has been in the past, largely because of the resurgence of the Ninth Amendment to the Constitution of the United States, applied to the states through the Due Process of Law clause of the Fourteenth Amendment.

The Ninth Amendment appears to be on the verge of an important rebirth in constitutional litigation. In the case of Griswold v. Connecticut, 381 U.S. 479 (1965), in which the Supreme Court struck down as unconstitutional a Connecticut statute purporting to protect the public morals, safety and health by means of a prohibition against advising on the use of contraceptives, the Ninth Amendment appears with emphasis in the opinion written by Justice Douglas for the Court and in the concurring opinion of Justice Goldberg. As the Harvard Law Review points out: "The injection of the Ninth Amendment into this controversy is a surprising and an important development. It is surprising because that provision has never before been a ground of a Supreme Court decision; it is important because in Griswold the Ninth Amendment was relied on by five Justices, including adherents of both the 'ordered liberty' and the 'penumbra' views." Note: "The Supreme Court, 1964 Term," 79 Harv. L.Rev. 56, at 163.

The liberties protected by the proponents of the Ninth Amendment and by

the proponents of substantive due process of law are not easy to define. However, various opinions of the Court indicate that the boundaries of liberty are quite broad. Liberty might even be considered to contain an element of what Justice Brandeis called the "right to be let alone". In fact, this right to be let alone is the underlying theme of the entire Bill of Rights. Arbitrariness may be attackedwhen the right to travel is involved. Aptheker v. Secretary of State, 378 U.S. 500 (1964). As the Court said in Meyer v. Nebraska, 262 U.S. 390, 399 (1923):

> "Without doubt, . . . [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the distates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

It was the possibility that a Bill of Rights, specifying particular rights of the citizen, would be construed so as to exclude from protection all of these residual rights which are "essential to the orderly pursuit of happiness by free men" that caused Alexander Hamilton to take up his pen and make the following observations in the

Federalist, No. 84 (Modern Library Edition, 1937), 559:

> "I go further, and affirm that bills of rights, in the sense and to the extent in which they are contented for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?"

The Ninth Amendment affords a much needed bulwark against the tendency of governments to read the Bill of Rights as an exclusive enumeration of those rights "necessary and proper" for "ordered liberty." This tendency of the states, and the Court's concern for such abuses, are abundantly clear in Griswold v. Connecticut, supra.

The concepts of the rationality of statutes, the boundaries of a valid legislative aim and the definition of a state interest all interlock in the analysis of any state statute which infringes the rights of the citizen, whether or not those rights are, in the absence of a reason for limiting or removing them, guaranteed by the Fourteenth Amendment, as it embodies the substantive due-process "concept of ordered liberty," or the specific guaranties of the various amendments of the Bill of Rights, including

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the Fourth, Fifth and Ninth. The Virginia Drug Control Act insofar as it prohibits sale and possession of marijuana must be examined in this context.

CONCLUSION

The petition for writ of certiorari should be granted for the above reasons.

Respectfully submitted,

STANLEY PAUL SCHU

/s/ Stanley E. Sacks
His Attorney

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APPENDIX A

VIRGINIA: IN THE SUPREME COURT OF VIRGINIA HELD AT THE SUPREME COURT BUILDING IN THE CITY OF RICHMOND ON THURSDAY THE 15TH DAY OF MARCH, 1973.

The petition of Stanley Paul Shu sometimes known as Stanley Paul Schu, for a writ of error and supersedeas to a judgment rendered by the Corporation Court of the City of Norfolk on the 4th day of October, 1972, in a prosecution by the Commonwealth against the said petitioner for a felony, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of the opinion that there is no reversible error in the judgment complained of, doth reject said petition and refuse said writ of error and supersedeas, the

APPENDIX A

effect of which is to affirm the judgment of the said Corporation Court.

A Copy,

Teste:

Howard G. Turner, Clerk

By:

/S/ Stockley D. Gardner
Deputy Clerk

APPENDIX B

§ 54-524.80 OF THE CODE OF VIRGINIA.

§ 54-524.80. SCHEDULE I. In determining that a drug shall be listed within Schedule 1, the Board shall find:

(1) A high potential for abuse, and

(2) No accepted medical use in the United States.

(a) Any of the following drugs, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, unless specifically excepted whenever the existence of such isomers, esters, ethers and salts is possible within the specific chemical designation are included in Schedule I:

APPENDIX B

(1) Acetylmethadol.

(2) Allylprodine.

(3) Alphactylmethadol.

(4) Alphameprodine.

(5) Alphamethadol.

(6) Benzethidine.

(7) Betacetylmethadol.

(8) Betameprodine.

(9) Betamethadol.

(10) Betaprodine.

(11) Clonitazene.

(12) Dextromoramide.

(13) Destrorphan.

(14) Diampromide.

(15) Diethyliambutene.

(16) Dimenoxadol.

(17) Dimepheptanol.

(18) Dimethyliambutene.

(19) Dioxaphetyl butyrate.

(20) Dipipanone.

(21) Ethylmethylthiambutene.

(1) Benzylmethanol.

(2) Allylprodine.

(3) Alphacetylmethadol.

(4) Alphameprodine.

(5) Alphamethadol.

(6) Benzethidine.

(7) Betacetylmethadol.

(8) Betameprodine.

(9) Betamethadol.

(10) Betaprodine.

(11) Clonitazene.

(12) Dextromoramide.

(13) Dextrorphan.

(14) Diampromide.

(15) Diethylthiambutene.

(16) Dimenoxadol.

(17) Dimepheptanol.

(18) Dimethylthiambutene.

(19) Dioxaphetyl butyrate.

(20) Diphenoxylate.

(21) Ethylmethylthiambutene.

(22) Etonitazene.

(23) Etoxeridine.

(24) Furethidine.

(25) Hydroxypethidine.

(26) Ketobemidone.

(27) Levomoramide.

(28) Levophenacylmorphan.

(29) Morpheridine.

(30) Noracy methadol.

(31) Norlevorphanol.

(32) Normethadone.

(33) Noripipanone.

(34) Phenadoxone.

(35) Phenampromide.

(36) Phenomorphan.

(37) Phenoperidine.

(38) Piritramide.

(39) Proheptazine.

(40) Properidine.

(41) Racemoramide.

(42) Trimeperidine.

(b) Any of the following opium derivatives, their salts, isomers and salts of isomers, unless specifically excepted, whenever the existence of such salts, isomers and salts of isomers is possible within the specific chemical designation:

(1) Acetylcodone.

(2) Benzylmorphine.

(3) Codeine methylbromide.

(4) Codeine-N-Oxide.

(5) Desomorphine.

(6) Heroin.

(7) Hydromorphinol.

(8) Methyldesorphine.

(9) Methylhydromorphine.

(10) Morphine methylbromide.

(11) Morphine methylsulfonate.

(12) Morphine-N-Oxide.

(13) Myrophine.

(14) Nicocodeine.

(B) Any of the following opium
derivatives, their salts, isomers and
salts of isomers, unless specifically
excepted, whenever the existence of
such salts, isomers and salts of isomers
is possible within the specific chemical
designation:

(1) Acetylmethadone.

(2) Allylprodine.

(3) Alphacetylmethadol.

(4) Alphameprodine.

(5) Alphamethadol.

(6) Benzethidine.

(7) Betacetylmethadol.

(8) Betameprodine.

(9) Betamethadol.

(10) Betaprodine.

(11) Clonitazene.

(12) Dextromoramide.

(13) Dextrorphan.

(14) Diampromide.

(15) Nicomorphine.

(16) Normorphine.

(17) Thebacon.

(c) Any material, compound, mixture or preparation which contains any quantity of the following hallucinogenic substances, their salts, isomers and salts of isomers, unless specifically excepted, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Bufotenine.

(2) Diethyltryptamine.

(3) Dimethyltryptamine.

(4) 4-methyl-2,5-dimethoxyamphetamine.

(5) Ibogaine.

(6) Lysergic acid diethylamide.

(7) Marijuana.

(8) Mescaline.

(9) Peyote.

(10) Psilocybin.

(11) Psilocyn.

(12) Tetrahydrocannabinol.

(13) Hashish.

(1970, c.650.)